No. 96-373

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LYNDA BROOKS; VERNA HOBSON; GERALDINE BAVARO; HARRIET EATON; JANE DOE and RICHARD ROE, as parents and guardians of, respectively, MICHAEL BROOKS; THERESA HOBSON; LISA BAVARO; EMILY EATON; JOHN DOE, and RACHEL ROE,

Petitioners,

—against—

GEORGE E. PATAKI, as Governor of the State of New York; THOMAS A. MAUL; JOEL A. DVOSKIN, and JAMES L. STONE as, respectively, Commissioners of the New York State Office of Mental Retardation and Developmental Disabilities; Office of Mental Health, and Department of Social Services,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Preliminary Statement

New York's opposing brief, dated October 15, 1996 ("NY Brief"), ably frames the central issue presented here: whether a due process liberty interest exists under the criteria of *DeShaney* v. *Winnebago County Dep't. of Social Services*, 489 US 189, 201 n. 9 (1989). (Point I, below.) New York's collateral *res judicata* argument misses our point of *Pullman* abstention. (Point II, below.)[1]

New York's Errors

Petitioners submit that several errors of fact and of New York state law appear in the opposing submission.

1. "Children's program"

No petitioner is in a "children's program". (*Cf.* NY Brief, p. 2.) All are in adult facilities, primarily campus institutional or group home care. All are housed separately from children.[2]

2. State aid to disabled adults

New York has never disavowed its obligation to care for the severely disabled, whatever their age may be. (*Cf.* NY Brief, pp. 2-3.) While federal educational funding is used up

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[1] No substantive response was made to our equal protection argument. (Petition, Point II.) New York relies on its *res judicata* point to prevent this Court's review of equal protection issues. (See Point II, *infra*.)

The Court of Appeals has still not ruled on equal protection. The District Court's resolution of that issue in plaintiffs' favor in two related cases still awaits appellate action. (See Petition, p. 8, and p. 7, nn. 8-9.)

[2] Michael Brooks, Theresa Hobson and Lisa Bavaro are all under care in adult facilities at the Woods School campus in Langhorne, Pa. Emily Eaton is under care in adult facilities at the Devereux Institute, in Devon, Pa.

to age 21, state funding has picked up thereafter since 1982. (4-5a.)[3] Twelve years of annually renewed appropriations created expectation and reliance in the New York parents.

3. "Indirect" state conduct

New York curiously advises that its political subordinates are the ones responsible for the placement of disabled children and the initial payment of caregivers. (NY Brief, p. 5.) For purposes of state action, this distinction makes no difference.

As *DeShaney* reminds us, the acts of "local governmental entities and their agents" constitute "state action". *DeShaney*, *supra*, 489 US at 195, n. 1. The District Court properly held, "[T]he State has been intimately involved in [petitioners'] institutionalization". (53a.)[4]

REPLY ARGUMENT

I. A STATE-DIRECTED INSTITUTIONALIZATION, REQUIRED TO TREAT SEVERE DISABILITY, BRINGS THE INSTITUTIONALIZED PERSON WITHIN THE PROTECTION OF SUBSTANTIVE DUE PROCESS.

In the context of disability, *DeShaney* recognized that due process rights attached upon "institutionalization". (489 US at 198-201.) This condition is equated to "incarceration", and any "other similar restraint of personal liberty". (489 US at 200.) It is undisputed that the disabled plaintiffs are institutionalized.

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[3] Indeed, in 55 of New York's 62 counties, payment continues to be made under the TCF statute. In all counties, new educational placements for minors continue to be made.

[4] The Court of Appeals found state action *arguendo*. (26-27a, n. 13.)

New York's argument appears to rest on the route by which the disabled reached the institution. *DeShaney* is looked to for its facts, apparently because Joshua DeShaney was outside hospital custody when injured. Two bolstering citations are added from another Court of Appeals: *Fialkowski* v. *Greenwich Home for Children, Inc.*, 921 F. 2d 459 (3 Cir. 1990), in which the disabled child was voluntarily institutionalized by his parents, and *Philadelphia Police and Fire Ass'n. for Handicapped Children* v. *City of Philadelphia*, 874 F. 2d 156 (3 Cir. 1989), in which the disabled individuals lived at home.[5] (See NY Brief, pp. 9-10.)

Neither case involved a right to continued funding while institutionalized by state action. This court should determine the reach of *DeShaney*.

II. *RES JUDICATA* IS NO BARRIER TO REVIEW

We read the Court of Appeals' *res judicata* disposition as a self-stated alternate holding (25-26a and n. 12; 35a), which does not prevent this Court from reviewing the constitutional holding.

Moreover, New York's argument conflicts with 55 years of federal abstention doctrine under *Railroad Commission of Texas* v. *Pullman Co.*, 312 US 496 (1941). We sought construction of a new state statute in state court, as *Pullman* requires. There was no other issue which "could have been raised" consistently with *Pullman* (*cf.* NY Brief, p. 11), because there would have been no constitutional violation if the state court had construed the statute to preserve funding.

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[5] The Third Circuit citations are welcome, for the underlying issue transcends any individual Court of Appeals.

Conclusion

For the reasons advanced above, and in the Petition, the writ of certiorari should be granted.

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October 25, 1996

Respectfully submitted,

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